

MAGISTRATE'S CRIMINAL APPEAL.

B. Sheldon (Federal Counsel) for the appellant.
R. R. Chelliah for 1st respondent.
Natha Singh for 2nd respondent.

Cases referred to:—

- (1) *Re London & Globe Finance Corporation, Ltd.* (1903) 1 Ch. 728.
- (2) *Re Henry Leonard Asquith Wines* (1955) 37 Cr. App. R. 197.

Hill J.:—The two respondents were charged respectively before the President, Sessions Court, Alor Star, with the following offences:—

Respondent No. (1):

1. That you on or about the 27th day of September, 1954, at Alor Star, Kedah, being an agent, namely a Technical Assistant employed by the Public Works Department, Kedah, knowingly used with intent to deceive your principal an account relating to a stay made by you at the Waldorf Hotel, Penang, in which your principal was interested, which was false in a material particular, namely it stated that you had occupied room No. 25 when you had in fact occupied room No. 23 together with one Ku Mohamed and which to your knowledge intended to deceive your principal and you thereby committed an offence punishable under section 3(c) of the Prevention of Corruption Ordinance, 1950.

2. That you at the same time and place being an agent as aforesaid knowingly used with intent to deceive your principal an account relating to a stay made by you at the Waldorf Hotel, Penang, which your principal was interested, which was false in a material particular, namely it stated that you had been charged at the rate of \$6.00 per diem for occupying a room in the said Hotel and which was to your knowledge intended to deceive your principal and you thereby committed an offence punishable under section 3(c) of the Prevention of Corruption Ordinance, 1950.

Respondent No. (2):

That you on or about the 27th day of September, 1954, at Alor Star, Kedah, being an agent namely a Technical Assistant employed in the Public Works Department, Kedah, knowingly used with intent to deceive your principal an account relating to a stay made by you at the Waldorf Hotel, Penang, in which your principal was interested, which was false in a material particular, namely it stated that you had been charged at the rate of \$6.00 per diem for occupying a room in the said Hotel and which was to your knowledge intended to deceive your principal and you thereby committed an offence punishable under section 3(c) of the Prevention of Corruption Ordinance 1950.

At the close of the case for the prosecution the learned President acquitted and discharged both the respondents without calling on them to make their defence.

Against this decision the Public Prosecutor appealed.

This was a very unsatisfactory prosecution, an unnecessary number of witnesses was called and most of them were unreliable. It is not surprising therefore that the learned President took the course he did, though had I been in his place I feel I would have called for a defence. Nevertheless, I cannot say that on the evidence itself that the President was obviously at fault in the course he adopted and I do not propose to interfere.

That being so I would ordinarily have dismissed this appeal without having recourse to a written judgment had I not felt it necessary to state my views on certain legal aspects arising from the charges.

These arise from the first ground in the Petition of Appeal at § 3 (a) namely "that the learned President misdirected himself in law in holding that an intent to defraud was a material element in the charge."

It is clear from his written judgment that this was the view held by the learned President.

The material element in the charges against the respondents was their using an account relating to their stay at the Waldorf Hotel, Penang, with intent to deceive their principal.

Here the intention to deceive can only be held to mean "to induce a frame of mind" and not to be extended to include an attempt to defraud.

Such an offence may well prove to be of a technical or even trivial nature. Where the evidence establishes that a fraudulent gain or breach of trust has resulted, that is an aspect to be taken into account when sentence is being considered, but the absence of such an ingredient should not affect the real issue or gravamen of the charge which is restricted to an intent to deceive for whatever purpose.

In this connection see the *dictum* of Buckley J. in *Re London & Globe Finance Corporation, Ltd.*⁽¹⁾ which was followed and indeed described as the *locus classicus* on the subject by the Court of Criminal Appeal in *Re Henry Leonard Asquith Wines*⁽²⁾.

In my view the incident giving rise to these charges against the respondents was clearly one that should have been dealt with departmentally, if any further action, resulting from an audit query, against the respondents was considered necessary.

As indicated already I do not propose to interfere with the learned President's order and the appeal, which was most properly brought by learned Deputy Public Prosecutor in view of the important legal aspect, is dismissed.

Appeal dismissed.

PUBLIC PROSECUTOR v. YOONG SHING PAWNSHOP & ORS.

[A. Cr. J. (Buhagiar J.) April 25, 1957]

[K. L.—Criminal Application No. 2 of 1957]

Pawnbrokers Enactment (F.M.S. Cap. 85), s. 20
— *Inquiry as to ownership of articles pawned produced as exhibits in Court—Discretion—Order.*

In any case where articles which have been in pawn are produced as exhibits in Court, before making any Order in respect of such exhibits, it is incumbent on the

Magistrate to hold an inquiry under section 20 of the Pawnbrokers Enactment (F.M.S. Cap. 85) and having held such inquiry he has the fullest discretion as to whether to make an Order or not. If on such inquiry the ownership of the articles is proved and the conditions of section 20 of the Pawnbrokers Enactment are fulfilled, the owner is entitled to the articles unconditionally and an Order to that effect should be made. There may be circumstances where a conditional Order is justified, and finally there may be circumstances where the ownership of the articles is a question of doubt and difficulty and in such cases it is a safe rule that no Order should be made.

Case referred to :—

- (1) *Ho York Quin of Chop Teck Chong Pawnshop v. R.* (1953) M.L.J. 1.

CRIMINAL APPLICATION.

H. S. Ong (Federal Counsel) for the applicant.

D. G. Ironside for the respondents.

Buhagiar J. :—One Simon David Theseira was charged in the Sessions Court at Kuala Lumpur under section 454 of the Penal Code and alternatively under section 411 of the Penal Code. He pleaded guilty to the original charge and on the 21st day of January, 1957, sentence was passed on him.

The facts of the case, which were admitted by the said Simon David Theseira were that he was a P.W.D. watchman employed at Guillemard Road, Housing Estate, to look after houses vacated by Government servants. On the 2nd January, 1957, the complainant, Mrs. P. H. Kirby, had locked up the house and went out. No one was in the house. At about 2 a.m. on her return she found her jewellery box kept in an unlocked wardrobe missing. She reported to the Police. The said Theseira was suspected. He admitted stealing the jewellery box with its contents. He got into the house by lifting the latch of a downstairs window from the outside. He produced five pawn tickets—pawned five articles for \$85. The rest of the missing articles were recovered from the said Theseira except three small articles which were still untraced.

After passing sentence the learned President made the following order: "All articles recovered together with the five pawn tickets to complainant. The five articles recovered from the pawnshops to the pawnbrokers."

This is an application by the Public Prosecutor for an Order that the Order made by the President, Sessions Court, Kuala Lumpur, on the 21st day of January, 1957, that the exhibits in the said case be returned to the pawnbrokers, be set aside and that the said exhibits be returned to the lawful owner, or such order be made thereon as the Court may deem just. The three pawnbrokers, the respondents concerned were made a party to this application and on the date of hearing the first and third respondents were represented by counsel.

At the hearing on behalf of the respondents the question was raised as to whether this procedure is according to law. He stated that he did not know of any similar application having been made and the Deputy Public Prosecutor must justify the procedure. I ruled that this procedure is within the provisions of section 410 of the Criminal Procedure Code. Under that section the Court has jurisdiction to modify, alter or annul an Order made by a Magistrate; the Court may do either by virtue of its revisionary powers or on application of the Public Prosecutor or the complainant or any other person affected by the Order.

With regard to the merits of the application, the learned Deputy Public Prosecutor submitted that the Magistrate should have held an inquiry before making any order and he should have held such inquiry under section 20 of the Pawnbrokers Enactment (F.M.S. Cap. 85).

On behalf of the respondents it was submitted that in this case the Magistrate acted under section 407 of the Criminal Procedure Code and he was not required to go further in the exercise of his criminal jurisdiction. It is, I think clear that under section 406A of the Criminal Procedure Code the Magistrate has the discretion to make or not to make an order but in cases like the present where articles have been pawned it is in my opinion incumbent on the Magistrate to hold an inquiry under section 20 of the Pawnbrokers Enactment and having held such inquiry he has again the fullest discretion as to whether to make an Order or not and in the Order he makes (if he decides to make one)—see *Ho York Quin of Chop Teck Chong Pawnshop v. R.*⁽¹⁾. If on such enquiry the ownership of the articles is proved and the conditions of section 20 of the Pawnbrokers Enactment are fulfilled the owner is entitled to the articles unconditionally and an Order to that effect should be made. There may be circumstances where a conditional Order is justified, and finally there may be circumstances where the ownership of the articles is a question of doubt and difficulty and in such cases it is the safe rule that no Order should be made. These questions, however, are matters to be considered after inquiry under section 20 of the Pawnbrokers Enactment has been held. The provisions of this section are complementary to the provisions of the Criminal Procedure Code. It gives the Court power to hold an enquiry under the circumstances therein mentioned but this is a power which the Court must exercise before making any Order.

In view of the above the Order made by the learned President as regards exhibits is set aside and evidence shall be taken under and for the purposes of section 20 of the Pawnbrokers Enactment.

Order accordingly.

Solicitors: *Lovelace & Hastings.*